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No. 91-794

In the
Supreme Court of the United States
October Term, 1992

HENRY HARPER, et al.,

Petitioners,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

On Writ of Certiorari To
The Supreme Court of Virginia

BRIEF OF THE STATE OF UTAH AND THE STATES OF ALABAMA, ALASKA, CALIFORNIA, CONNECTICUT,

(Continued on the inside cover)

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INTEREST OF AMICI CURIAE

Amici include states[1] that could be liable for refund claims depending on whether the rule announced in Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) ("Davis") is applied retroactively,[2] states that have resolved Davis refund claims under state law,[3] states that do not have statutes subject to challenge under Davis,[4] and states that do not tax individual income but depend on other tax revenues.[5] As governments providing a myriad of programs and services essential to their citizens, amici must be able to forecast and budget limited revenues with the confidence that taxes collected and spent under longstanding, presumptively valid tax statutes need not be refunded if such statutes are later invalidated by an unexpected and unforeseeable court decision. Because a state's ability to do so is directly affected by the rules governing the retroactive application of

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[1] Amici also include the Territories of American Samoa and the United States Virgin Islands, the Commonwealth of Puerto Rico, and the District of Columbia. All amici are referred to collectively as "states."

[2] Alabama, Iowa, Kentucky, Mississippi, Montana, New York, Oklahoma, South Carolina, Utah, and Wisconsin.

[3] See e.g., New Mexico and Oregon.

[4] Alaska, the Territory of American Samoa, California, the Commonwealth of Puerto Rico, Connecticut, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, and the Territory of the Virgin Islands.

[5] Alaska, Nevada, South Dakota, Texas, Washington, and Wyoming.

U.S. Supreme Court decisions involving state taxes, amici have a real and abiding interest in this case.

SUMMARY OF ARGUMENT

Unexpected and unforeseeable decisions of the Court with respect to state tax measures, if given fully retroactive effect, can upend the expectations of states and taxpayers regarding transactions justifiably regarded as settled. The three-part test set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ("Chevron Oil"), provides a fair, workable standard by which to determine the retroactivity of the Court's state tax decisions (a standard which recognizes stare decisis concerns underlying the retroactivity/prospectivity issue), considers the reliance interests of both the state and affected taxpayers, and balances those interests to reach an equitable result whenever a state tax statute is validated or invalidated on federal grounds.

The Chevron Oil test gives the Court the flexibility to take into account the economic impact of its law-changing decisions, and to avoid results that would only serve to punish the losing party for conduct that was altogether reasonable at the time. The significant fiscal consequences of Davis -- potential refund liabilities exceeding $1.841 billion -- highlight the continuing need for, and importance of, the Chevron Oil analysis.

Because a decision by the Court in a state tax case frequently implicates states and taxpayers other than the ones specifically before the Court, it is also important that non-party states or taxpayers affected by the Court's ruling be able to later raise the retroactivity issue, when the issue was

not raised or briefed by the parties, and the Court's decision itself does not explicitly dispose of the issue. The petitioners' suggestion that the question is decided sub silentio, if the Court does not expressly reserve the issue, should be rejected.

ARGUMENT

I.

The Unique Problems Associated with Retroactivity in State Tax Cases Compel Continued Application of the Chevron Oil Test.

The Court has long recognized the essential role that taxes play for states and their citizens. See e.g. Springer v. United States, 102 U.S. 586, 594 (1880) ("The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of [the] government"); Dows v. Chicago, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments."). The programs that state taxes support affect all the citizens of the state, and often involve services that could not realistically be furnished other than by the government, or services on which the program beneficiaries rely for their most basic needs. For these reasons, and because the result in a Supreme Court case challenging a state tax statute on federal grounds can reverberate far beyond the parties before the Court, Supreme Court decisions concerning the states' taxing power may potentially affect every individual and business in the nation.

The instant case dramatically illustrates the effect that such a Supreme Court decision can have. The Court's ruling three years ago in Davis, invalidated a portion of Michigan's income tax scheme on intergovernmental tax immunity grounds, and prompted litigation in 22 other states with similar tax provisions. The aftermath of Davis points out the continuing need for a clear and fair standard for determining when a Supreme Court decision invalidating a state tax statute will be applied retroactively. The Chevron Oil standard takes into account the special nature of state taxes and the tremendous, far-reaching impact of such a decision.

While the Court has the responsibility to see that statutes enacted by state legislatures comply with applicable federal constitutional principles, it has expressed a heightened regard for the unique importance of state taxes in general and the standards by which such taxes are measured. In cases involving Equal Protection issues, states are given great leeway in making classifications and drawing lines within tax statutes. Lehnhausen v. Lakeshore Auto Parts Co., 410 U.S. 356, 359 (1973). Where a classification is not "palpably arbitrary" or does not create "invidious" discrimination between persons similarly situated, there is no constitutional violation. Allied Stores of Ohio v. Bowers, 358 U.S. 522, 530 (1959). "Under [this] standard a statute will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose." Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983).

States are also given greater latitude in collecting taxes than Due Process would normally permit. "[I]t is well established that a State need not provide predeprivation process for the exaction of taxes." McKesson Corp. v.

Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 37 (1990). Rather, the seizure of property for the collection of taxes constitutes one of those "extraordinary situations" justifying postponement of notice and hearing until after the property has been seized. The deference accorded to state tax procedures is a recognition of the critical importance of state taxes to all state government functions. Congress has expressly required the same policy of deference in the Tax Injunction Act, 28 U.S.C. § 1341. Rosewell v. LaSalle National Bank, 450 U.S. 503 (1981). The Court, in determining the retroactive effect of an unanticipated holding that a state tax violates the Constitution, should have no less regard for the vital and vulnerable nature of state tax systems.

The test for determining retroactivity in this context should take into account the reasonable reliance interests and settled expectations of state governments, which must enact and administer taxing statutes in constitutional waters whose channels are often not clearly marked. The doctrine of intergovernmental tax immunity, upon which Davis and this case are based, has been described as ambiguous and as one of the "most esoteric of constitutional philosophies." Bohn v. Waddell, 790 P.2d 772, 784 (Ariz. Tax Ct. 1990); Swanson v. Powers, 937 F.2d 965, 968 (4th Cir. 1991), cert. denied, __ U.S. __, 112 S. Ct. 871 (1992).[6] Consequently, state legislatures and tax officials, acting in good faith, will sometimes miss what later emerges as the constitutional

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[6] Compare Justice Scalia's comment with regard to the negative commerce clause: "[T]he practical results we have educed...form not a rock but a 'quagmire'." Tyler Pipe Industries v. Dep't of Revenue, 483 U.S. 232, 259 (1987) (Scalia, J., concurring in part and dissenting in part) (quoting Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959)).

mark. The price that the state and its citizens must pay for the failure to foresee new constitutional developments should not necessarily be years of retroactive liability for taxes already collected and spent.

The problem becomes even more acute when state tax statutes in place for years are assailed as violative of constitutional principles that have evolved over time. One practical gauge of a statute's continued validity is the absence of serious challenges. Therefore, the Court's retroactivity standard should take into account whether a decision "disrupts a practice long accepted and widely relied upon." Milton v. Wainright, 407 U.S. 371, 381-82 n. 2 (1972) (Stewart, J., dissenting), cited with approval in United States v. Johnson, 457 U.S. 537, 552 (1982).

The Court has recently reaffirmed its concern for the effect which its state tax decisions can have on settled expectations. In Quill Corp. v. North Dakota, 504 U.S. __, 112 S. Ct. 1904 (1992), the Court noted that "the Bellas Hess rule has engendered substantial reliance and has become part of the basic framework of a sizeable industry. The 'interest in stability and orderly development of law' that undergirds the doctrine of stare decisis . . . therefore counsels adherence to settled precedent." Id. at 1916 (quoting Runyon v. McCrary, 427 U.S. 160, 190-191 (1976) (Stevens, J. concurring)). As noted in American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2341 (1990) (plurality) (quoting United States v. Estate of Donnelly, 397 U.S. 286, 295 (1970) (Harlan, J. concurring):

> In those relatively rare circumstances where established precedent is overruled, the doctrine of non-retroactivity allows a court to adhere to

> past precedent in a limited number of cases, in order to avoid "jolting the expectations of parties to a transaction." . . . As Justice Cardozo discerned, prospective overruling allows courts to respect the principle of *stare decisis* even when they are impelled to change the law in light of new understanding.

Amici submit that the three-part test set forth in Chevron Oil v. Huson, 404 U.S. 97 (1971), provides a reasonable, workable standard to determine the retroactivity of the Court's state tax decisions.[7] The Chevron Oil analysis recognizes stare decisis concerns, considers the reliance interests of both the state and affected taxpayers, and balances those interests to reach an equitable result involving either the validation or invalidation of a state tax statute.

In a large majority of cases, the Court will assess the legality of a state tax on the basis of established Supreme Court precedent, and the Court's decision -- while contributing to the Court's jurisprudence -- will not take the Court in an entirely new direction. If the challenged tax is ruled constitutional based on established precedent, it is

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[7] In Chevron Oil, supra, the Supreme Court set forth three factors to be considered in determining whether a judicial ruling should operate prospectively only. A decision will operate prospectively only:

(1) if it establishes a new principle of law by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed;

(2) if prospective only application will not retard the operation of the rule in question; and

(3) if retroactive application would result in inequity, injustice or hardship. Chevron Oil, 404 U.S. at 106-107.

appropriate to give the decision full retroactive effect, and the Chevron Oil analysis would so provide. States, if they are to plan and operate effectively, must be able to rely on revenues collected under statutes that satisfy existing Supreme Court precedent, and taxpayers should be expected to treat such enactments as valid until struck down.

The Chevron Oil analysis also reaches a fair result when a state tax statute is held unconstitutional based on existing Supreme Court precedent. Under such circumstances, the state could not justifiably have relied on the revenues generated by its enactment, would have no settled expectations entitled to deference, and could not reasonably complain when the Court's ruling is given retroactive effect. For the operation of Chevron Oil under these facts, see Ashland Oil, Inc. v. Caryl, 497 U.S. 916 (1990).

If all Supreme Court decisions were automatically given retroactive effect, however, unacceptably harsh consequences could follow when the Court overruled clear past precedent in validating or invalidating a state tax statute on federal grounds. This particularly is true as to challenges that may be brought after a new decision is announced. If a statute enacted in good faith reliance on clear Supreme Court precedent is later held invalid, prospective-only application of the new rule will sufficiently vindicate the successful taxpayer, who will no longer be subject to the offending levy, without upending the state's reasonable assumptions regarding matters thought to be complete, or threatening undue interference with the state's ability to fund essential government services.

By the same token, taxpayers have legitimate reliance interests that should not be ignored when determining the retroactive effect of a Supreme Court ruling. If the Court overrules clear precedent under which a state tax statute would have been unconstitutional, the taxpayer's expectations will be upset by a fully retroactive application of the holding. Such an application could permit the state to impose a wholly-unanticipated back-liability on individuals or businesses who had reasonably assumed all their taxes had been fully paid. While taxpayers in this situation may be protected in part by other constitutional principles which limit the state's ability to assess taxes retroactively based on events occurring in prior years, see, e.g., Welch v. Henry, 305 U.S. 134, 147 (1938) ("retroactive application [may be] so harsh and oppressive as to transgress [Due Process]"), such restraints are themselves based on the principle which the Chevron Oil test is intended fully to vindicate: under certain circumstances it is fundamentally unfair to revisit transactions justifiably regarded as finished.

The first prong of the Chevron Oil test directs the Court to determine whether the decision establishes a new principle of law "by overruling clear past precedent on which litigants may have relied." Chevron Oil, 404 U.S. at 106. This analysis does not require prospectivity in all cases. Rather, the overruled precedent must have been "clear," so that the losing party might reasonably have "relied" on it. The Chevron Oil test allows the Court to view a constitutional issue in its full historical perspective, and to consider whether the overruled decision may have been narrowed or questioned over the years to the extent that it retained little vitality.

The Chevron Oil analysis also accommodates the situation in which the Court first announces a new rule of law. The number and variety of tax issues confronting state officials and taxpayers are staggering, and the Court will inevitably be faced with circumstances in which no applicable precedent exists. In times of shrinking economies and declining tax bases, states should not be asked to forsake possible revenue sources simply because there is no such precedent by which to prejudge the validity of a proposed tax measure. By the same token, a taxpayer cannot argue that he justifiably relied on the unconstitutionality of a statute when there was no Supreme Court precedent clearly foreshadowing that result. If the taxpayer succeeds in a challenge, and the Court adopts a new legal rule, the taxpayer will still receive the rule's future benefit.

Once a decision establishes "a new principle of law," the Chevron Oil test provides built-in flexibility that takes into account equitable considerations. The Court must weigh "the inequity imposed by retroactive application" and determine if retroactive application "could produce substantial inequitable results." Chevron Oil, 404 U.S. at 106-107. There would be little reason to depart from the normal rule of retroactivity, notwithstanding an unexpected and unforeseeable holding, where the liability for back taxes or refunds resulting from retroactive application would be insignificant. The instant case presents quite the opposite situation, however, one in which the effect of retroactive application could be devastating to those states that were understandably surprised by the new rule of law announced in Davis.

Nearly ten years ago Justice Powell, writing for five Justices in Arizona Governing Committee for Tax Deferred

Annuity and Compensation Plans v. Norris, 463 U.S. 1073 (1983), concluded that the imposition on the State of Arizona of retroactive monetary liability potentially amounting to hundreds of millions of dollars would be inappropriate even though the state had violated Title VII in its administration of a state retirement plan. The Court explained that "[i]mposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial financial deficits. Income, excise and property taxes are being increased." Id. at 1106-07. Because the illegality of Arizona's conduct had not been settled until the Norris decision itself, the Court saw "no justification . . . to impose this magnitude of burden retroactively on the public." Id. at 1107. The circumstances in the present case are even more compelling than those in Norris.

II.

The Potential Fiscal Impact of Retroactive Application of Davis is Enormous.

The total amount at stake among the sixteen states still dealing with Davis-related issues is over $1.841 billion. The chart below sets out the potential refund liability under statutes of limitations argued by retirees.

Projected Refund Liability Under State Statute of Limitations Period[8]

Alabama	$ 20 million
Arizona	339 million[9]
Arkansas	45 million
Georgia	100 million
Iowa	41 million
Kansas	95 million
Kentucky	74 million
Mississippi	35 million
Montana	20 million
New York	55 million

[8] Unless otherwise noted, all amounts are estimates of the potential liability for full refund of tax principal and accrued interest. The information contained in this chart was provided by each state's Department of Revenue or Taxation through its legal counsel in response to a telephone survey. See also, Appendix A, Brief for Respondent.

[9] The Arizona Tax Court has issued a refund order using a partial refund formula whereby the state's liability is substantially less than this figure. This order has been appealed by both parties.

North Carolina	140 million[10]
Oklahoma	20 million[11]
South Carolina	200 million
Utah	120 million
Virginia	467 million
Wisconsin	70 million
TOTAL	$1.841 billion

The retroactive liability threatened by Davis comes at a time when "many states struggle with the biggest fiscal crisis to hit them in a decade."[12] State revenue growth nationally slowed from a pre-recession average of 9.2% annually to 2.5 and 2.0 percent, respectively, during 1990 and 1991.[13] Corporate income tax collections dropped by

[10] Amount alleged by federal retirees to be at issue in presently pending class action litigation.

[11] Estimated tax liability exclusive of any interest.

[12] Obstacle to Recovery: States' Fiscal Squeeze, Wall St. J. (June 17, 1991) at A1.

[13] Bureau of the Census, U.S. Dep't of Commerce, Quarterly Summary of Federal, State, and Local Tax Revenue 5 (April-June 1991).

roughly 12% in 1990 alone.[14] The states' sales tax bases eroded[15] as household spending on durable and non-durable goods declined.[16] During 1987, 1988, and 1989, total state and local government expenditures exceeded revenues by 2.7, 3.1, and 3.1 percent respectively, taking into account everything other than contributions to or benefits paid from "social insurance funds" such as state and local retirement plans, which are properly regarded as funds not generally available to the government.[17] With the onset of the recession, the situation worsened: in 1990 and 1991, such expenditures -- including the costs of services increasingly strained by the effects of the economic downturn, such as greater unemployment -- exceeded revenues by roughly 5%.[18] As a consequence, by the 1991 fiscal year, state reserves, so-called "rainy day" funds to protect against revenue shortfalls and unexpected expenses, had fallen to an

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[14] Id.

[15] Id.

[16] Bureau of Economic Analysis, U.S. Dep't of Commerce, Personal Consumption by Major Type of Product, Survey of Current Business 65 (July 1992).

[17] Sullivan, D., Bureau of Economic Analysis, U.S. Dep't of Commerce, State and Local Government Fiscal Position in 1991, Survey of Current Business 36-41 (March 1992). In 1987, for example, the $14.7 billion deficit referenced equals 2.7 percent of the difference between total receipts of $594.3 billion and $49.2 billion in social insurance contributions.

[18] Id.

average of 0.8% of expenditures,[19] an amount adequate only to offset for 75 days the effects of inflation on a state's purchasing power. Massive state budget shortfalls, attributable to declining tax revenues and increased mandatory state spending on federal entitlement programs, are forcing states to cut services, lay off employees, and raise taxes.[20] New York, for example, which faces a $55 million refund liability as a result of Davis, has proposed to eliminate a $938 million budget deficit by cutting $1.2 billion in welfare programs, eliminating 6,200 state jobs, and raising levies on hospitals and nursing homes.[21]

Montana is yet another Davis state dealing with a severe budget crisis. Montana is a state with one of the highest poverty rates and the sixth lowest median household income in the nation. It recently convened its second Special Legislative Session in two years to address a $140 million budget deficit. This deficit represents roughly $175 for every man, woman, and child in the state,[22] or $700 for a family of four. Among the legislative proposals considered to ease the budget crunch were the adoption (for the first time) of a 4% state sales tax, the implementation of an unpaid furlough

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[19] National Governors' Association/National Association of State Budget Officers, Fiscal Survey of the States 25 (April 1992).

[20] Supra, note 12. See also State Tax Revenue Growth is Hurt by Slow Economy, Wall St. J. (Nov. 14, 1990) at A10.

[21] Cuomo's New York Budget to Cut Welfare, Wall St. J. (Jan. 22, 1992) at A16.

[22] According to the 1990 census, Montana's population was less than 800,000.

program for state employees, a reduction of state education spending by eight to ten percent, and a 7% annual surtax on all general fund tax revenue sources. While Montana's potential refund liability under Davis is only $20 million, this equates to an additional $100 in taxes for the average family of four in the state.

If refunds are required in Davis litigation, the hardest hit will be among this country's poorest and least educated. The 1990 census found that 13.1% of the U.S. population lived below the poverty level, and 75.2% had at least a high school education. Of the Davis states, four are located in the South Central region, the poorest in the nation. Alabama has a poverty rate of 18.3%, and a high school graduation rate of only 66.9%. In Arkansas, 19.1% live in poverty, while only 66.3% have their diploma. In Kentucky, the figures are 19.0% and 64.6%, respectively. Over a quarter of Mississippi's population (25.2%) lives in poverty, and only 64.3% have graduated from high school. These states already are dealing with budget crises: Alabama has cut agency budgets 5% across the board, Arkansas has been forced to reduce education spending, and Kentucky is taking steps to eliminate a $200 million budget deficit for the 1991 biennium. At the same time, the combined potential refund liabilities under Davis, of Alabama, Arkansas, Kentucky, and Mississippi, exceed $173 million.

Finally, revenue collections in the Respondent state, Virginia, have not only failed to keep pace with an inflation rate of 5.1%, but actually declined in 1991 (from $5.494 billion to $5.471 billion). This revenue loss, coupled with the effects of inflation and an 18.4% increase in federally-mandated Medicaid expenditures, has required the reduction of state agency budgets on an average of 25% below 1990

funding levels. Virginia's potential liability arising from Davis now exceeds $467 million, an amount that, if it had to be refunded, would need to be recouped through further cuts in services or employment, an increase in the state's sales tax rate from 4.5% to 5.5%, or similar measures adversely affecting all the citizens of that state.

Contrary to petitioners' view, state government is not merely a deep pocket from which to extract painlessly the tremendous sums involved in a case like this. The burden of a retroactive application of an unexpected and unforeseeable Supreme Court decision invalidating a state tax statute "will fall not on some corrupt state government, but ultimately on the blameless and unexpecting citizens of [the state] in the form of higher taxes and reduced benefits." James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439, 2456 (1991) ("Beam") (O'Connor, J., dissenting). The Chevron Oil test gives the Court the flexibility to take into account the economic impact of its law-changing decisions, and to avoid results that would only serve to punish the losing party for conduct that was altogether reasonable at the time.

III.

Resolution of the Retroactivity Issue Should Be Made Explicitly and with an Opportunity for Interested Parties to Be Heard.

Because retroactive application of the Court's tax decisions can have such far-reaching ramifications, a non-party state or taxpayer affected by the decision should be able to raise the retroactivity issue later, whenever the issue was not raised or briefed at all in the earlier case and the Court's

decision itself does not explicitly dispose of the question. On page 9 of their brief, petitioners state that "Beam . . . requires that every . . . court apply Davis' substantive holding to the parties before them." Petitioners argue that Beam mandates retroactive application of a decision by the Court -- and mandates such application as to everyone affected thereby, not simply the actual parties before the Court -- if the substantive decision itself does not specifically reserve the issue or hold that the ruling will operate prospectively only. Amici in support of the petitioners state that "when this Court chooses to reserve judgment on the retroactive or prospective application of a rule-changing decision, it has had no difficulty expressing that determination in the rule-changing decision itself."[23] Yet at the time Davis was decided, there was no hint from any of the Court's prior opinions that silence might be read to have the impact that the petitioners claim for it here. The inequity of applying the petitioners' rule to the case at hand is apparent. While no majority line of reasoning emerges from Beam, one point is clear: the end result stems solely from the fact that the Court chose to give the litigants in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), the retroactive benefit of the new rule established by that case, because the Court there had in fact decided in favor of retroactivity. See Beam, 111 S. Ct. at 2445 n.2 (Souter, J., plurality opinion). In Davis, by contrast, the State of Michigan had previously agreed to pay the taxpayer a refund if Michigan's statute was found to violate federal law, and the retroactive application of the Court's decision to Mr. Davis was not at issue. In short, the present case is unlike Beam because Davis is unlike Bacchus.

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[23] Brief Amici Curiae for Designated Federal Retirees in Kansas, et al., page 7 n.3.

Even if applied only to future cases, the rule proposed by the petitioners presents problems. Retroactivity may not be raised by the parties because the question is irrelevant under the tax statutes of the particular state. See, e.g., Hackman v. Missouri, 771 S.W.2d 77, 81 (Mo. 1989), cert. denied, 493 U.S. 1019 (1990) ("[W]e hold that by its adoption of Section 143.801, the State of Missouri has consented to a refund of any overpayment . . . of income tax . . . . Having so concluded, there is no need to consider whether Davis should be applied retroactively or only prospectively . . . ."). See generally McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 52 n.36 (1990) ("The State is free, of course, to provide broader relief as a matter of state law than is required by the Federal Constitution.")

A party may make a poor tactical decision and fail to advance a valid claim that any adverse ruling should be given prospective effect only. The viability of such a claim may be apparent only after the Court's substantive decision has been carefully analyzed. According to petitioners, the Court must expressly determine, in the substantive ruling itself, either that the decision should be applied prospectively only or that such an argument has sufficient merit to be reserved; otherwise, the decision applies retroactively to everyone. Without the benefit of briefs on the question, however, the Court may not be in a position to appreciate the impact of its ruling on transactions and events occurring before the date of decision, or the extent to which the Court's ruling may represent an unexpected departure from prior law. "It is . . . often difficult to determine when a case announces a new rule," Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality), as the conflicting decisions of the courts that have grappled with Davis make clear.

While the Court's sua sponte 'consideration of retroactivity may be "far from novel," id. at 300, the Court should not feel obligated to deal with such a potentially important matter at the point of initial decision, at least where, as in Davis, doing so would not affect the actual outcome of the case at hand. Even a decision to expressly reserve the retroactivity issue, or to invite amicus briefs on the issue, involves a threshold determination regarding the validity of an argument in favor of prospective-only application. When the Court chooses simply to make no comment whatsoever, that should not prematurely preclude other affected states or taxpayers from raising, briefing, and fully arguing the point at some other time.

CONCLUSION

For the reasons discussed above, amici respectfully submit that the Court should clearly recognize Chevron Oil as the test by which retroactivity will be determined in a case like this, apply that test as urged by the State of Virginia to the Court's decision in Davis, and affirm the decision of the Virginia Supreme Court below.

Respectfully submitted,

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